No. (1) 061712 2007

In the Supreme Court of the United States

SHARON MACY,

Petitioner,

v.

HOPKINS COUNTY BOARD OF EDUCATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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June 25, 2007

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QUESTION PRESENTED

When a Summary Judgment is sought by an employer, upon discrimination claims alleged by an employee, under the American Disabilities Act, 42 U.S.C. § 12112(a) or the Rehabilitation Act, 29 U.S.C. § 794(a), the Court should apply the "motivating factor" test, as opposed to the "sole" factor test in determining if the discharge of employment was due in part to an employee's actionable disability.

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Plaintiff - Appellant and Petitioner: Sharon Macy

Defendant - Appellee and Respondent: Hopkins County School Board of Education, also referred to as Hopkins County School Board of Education by the 6th Circuit Court of Appeals.

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PETITION FOR WRIT OF CERTIORARI

Sharon Macy respectfully petitions for a writ of certiorari to review the opinion and judgment of the U.S. Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Opinion of the U.S. Court of Appeals for the Sixth Circuit, dated April 12, 2007, is officially reported at *Macy v. Hopkins County School Board of Education* , No. 06-5722, 2007 U.S. App. LEXIS 8382 (6th Cir. Apr. 12, 2007), and is reproduced at App. A, 1a-26a.

The Memorandum Opinion and Order of the U.S. District Court for the Western District of Kentucky, Owensboro Division, dated May 1, 2006, is officially reported at 429 F. Supp. 2d 888, and 2006 U.S. Dist. LEXIS 28035 and is reproduced at App. B, 27a-54a.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Sixth Circuit sought to be reviewed was entered on April 12, 2007. The Petition is timely filed under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1 because it is being filed within 90 days of the entry of the opinion and judgment sought to be reviewed. This Court has jurisdiction to review the judgment of the U.S. Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C.§ 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are 42 U.S.C. § 12112(a) of the American Disabilities Act and 29 U.S.C. § 794(a) of the Rehabilitation Act. The relevant statutory provisions are reproduced at App. C, 55a.-56a.

STATEMENT OF THE CASE

This action arises from the employment termination of the Petitioner, Sharon Macy ("Macy"), a disabled teacher, by the Respondent, Hopkins County Board of Education ("Board"), on November 30, 2000.

The issues in this Petition arise from the granting of a Summary Judgment upon Macy's claims by the U.S. District Court in favor of the Hopkins County School Board of Education.

The U.S. District Court applied the U.S. Court of Appeals for the Sixth Circuit "sole factor" test in determining whether or not the Board had been pretextual in their termination of Macy's employment based upon her disability as opposed to applying the majority rule of other U.S. Courts of Appeal, which is the "motivating factor" test so as to avoid a summary judgment in favor of the employer.

Macy was clearly a disabled person under the provisions of the American Disability Act, 42 U.S.C. § 12112(a) ("ADA") and the Rehabilitation Act, 29 U.S.C. § 794(a), and was on a "504 Individualized Accommodation Plan", as a result of a closed head injury sustained in 1987 and exacerbated in 1995, having been diagnosed with "post concussive syndrome".

Macy had filed numerous complaints as to the Board's failure to carry out said 504 Plan, to include filing an Equal Employment Opportunity Complaint in February 2000.

Macy was terminated on November 30, 2000, after having allegedly disciplined several unsupervised members of the middle school's boys' basketball team, by the use of language reported as threatening to kill them, which Macy vehemently denied. Subsequent to her termination, she was convicted of a Class A misdemeanor, Ky. Rev. Stat. Ann. § 508.080, Terroristic Threatening.

The District Court reasoned that Macy's termination was not based solely on her disability and that no probative evidence was submitted to establish pretextual termination. Macy appealed to the U.S. Court of Appeals for the Sixth Circuit which affirmed the order and judgment of the District Court. The Sixth Circuit held that it was bound by its holding in *Monette v. Elec. Data Sys. Corp.*, 90 F.3d 1173 (6th Cir. 1996) and *Hedrick v. W. Reserve Case Sys.*, 355 F.3d 444 (6th Cir.); *cert. denied*, 543 U.S. 817 (2004).

Macy petitions this Court for review of the Sixth Circuit's decision holding that an employee may recover under the ADA only if the sole factor relied upon by the employer is the employee's disability and its holding that pretextual action was not established in her prima facie case of disparate treatment.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD RESOLVE THE SPLIT AMONG THE CIRCUITS AS TO WHETHER AN EMPLOYEE MAY RECOVER UNDER THE AMERICAN DISABILITY ACT IF THE EMPLOYEE'S DISABILITY WAS A "MOTIVATING FACTOR" IN THE EMPLOYER'S DECISION AND THAT THE EMPLOYEE SHOULD NOT BE REQUIRED TO ESTABLISH THAT THEY WERE FIRED "SOLELY" BECAUSE OF THEIR DISABILITY.

The U.S. Sixth Circuit opinion states it is the only Federal Circuit Court, save one, which requires a fired employee to prove that they were fired "solely" because of their disability, as opposed to permitting a recover if the disability was a "motivating factor" in the employer's decision. *Head v. Glacier Northwest, Inc.*, 413 F.3d 1053, 1063-1065 (9th Cir. 2005); *Parker v. Columbia Pictures Indus.*, 204 F.3d 326 (2nd Cir. 2000); *Baird v. ex rel Baird vs. Rose*, 192 F.3d 462 (4th Cir. 1999); *Foster v. Arthur Anderson, LLP*, 168 F.3d 1029 (7th Cir. 1999); *Newberry v. East Tex. State Univ.*, 161 F.3d 276 (5th Cir. 1998); *McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068 (11th Cir. 1996) *cert. denied*, 520 U.S. 1228 (1997); *Katz v. City Metal Co.*, 87 F.3d 26 (1st Cir. 1996); *Pedigo v. P.A.M. Transp., Inc.*, 60 F.3d 1300 (8th Cir. 1995)

The U.S. Sixth Circuit opinion acknowledges its minority view on this issue, as being bound by its own past holding in *Monette v. Elec. Data Sys. Corp.*, 90 F.3d 1173 (6th Cir. 1996) and *Hedrick v. W. Reserve Case Sys.*, 355 F.3d 444 (6th Cir.), *cert. denied*, 543 U.S. 817 (2004), and relies on the procedural requirement to apply reported panel opinions on

subsequent panels "...whether the reasoning set forth in those opinions were correct or not."

The District Court was also bound by the U.S. 6th Circuit's prior opinions. In appealing from the District Court's Summary Judgment this issue was presented as part of the de novo review, that the factors to be considered constituted a fact question for the jury as to what the motivating factors were in terminating her employment, and that Macy's disability was not the "sole" factor but rather her American Disability Act protected disability status was a "motivating factor" in her firing. This issue was thus preserved on appeal and not waived as a federal question.

Uniformity of interpretation and application of a federal statute is a principle tenant of the Doctrine of Equal Protection under the law. Macy should not be denied her opportunity to be heard in a District Court of the U.S. 6th Circuit when she would have been heard in the other vast majority of U.S. Circuit Court of Appeals.

It is time that the majority reasoning so widely adopted by other U.S. Circuits also be applied in the 6th Circuit, in ADA claims for wrongful termination of employment.

II. SUMMARY JUDGMENT WAS INAPPROPRIATE WHERE QUESTIONS OF MATERIAL FACT EXISTED UPON THE QUESTION OF WHETHER MACY'S TERMINATION OF EMPLOYMENT WAS PRETEXTUAL IN NATURE.

When a question of fact exists as to the motivating factors behind the termination of employment of a disabled worker,

it is inappropriate and reversible error to grant a Summary Judgment.

A prima facie case of disparate treatment had been established by Macy and was acknowledged by the 6th Circuit in its opinion. However, the 6th Circuit applied its "sole factor" criteria in finding that, in their opinion, reasons other than Macy's disability were legitimate, non-discriminatory and non-pretextual, based upon its minority view set forth in *Monette*, *ibid*.

Upon remand to the District Court for trial, with instructions that the majority view standard of "motivating factor" test be applied, Macy will be able to submit her theory of her case to the jury wherein they will determine if her disability was a motivating factor in the Hopkins County Board of Education's decision to terminate her employment and if so, to what extent she should be compensated for wrongful termination.

Certainly reasonable minds could conclude that the allegations of threats to children were only that (since the allegations had been vehemently denied by Macy) and no judicial finding had yet been made as of the date of termination, and that the firing of Macy was based on her actionable disability, resulting in a recovery of damages for Macy.

The Board's explanation for terminating Macy's employment was pretextual in nature. Pretext is established by showing that the Board's non-discriminatory reason (1) had no basis in fact, (2) did not actually motivate the Board's challenged conduct; or (3) was insufficient to warrant the challenged conduct. *Dews vs. A. B. Dick Co.*, 231 F.3d 1016, at 1020 (6th Cir. 2000)

Macy produced sufficient evidence from which a jury may reasonably reject the Board's explanation. *Manzer vs. Diamond Shamrock Chemical Co.*, 29 F.3d 1078, 1083 (6th Cir. 1994)

If Macy can demonstrate the Board's proffered non-discriminatory reason is pretextual, a trier of fact may infer discrimination. *Dews*, *ibid*, at 1021.

If Macy had subsequently been acquitted of the criminal charges (there being the presumption of innocence on the date of her termination) then, the Board's termination of Macy as a teacher would have been reasonably interpreted as discriminatory and/or retaliatory under her theory of her causes.

The District Court, acting with the knowledge of the disposition of the criminal charges, but not acting solely with the facts known to the Board on November 30, 2000, committed further error by equating allegations of criminal conduct to "...posing a direct threat to the students..." precluding the need for reasonable accommodations. 42 U.S.C. § 12113(b); 29 C.F.R. § 1630.15(b)(2).

As of the date of Macy's discharge, there was no evidence that she was a significant risk to the health or safety of others that would not be eliminated by reasonable accommodation. 42 U.S.C. § 12111(3). In fact, the record shows that the Board continued her employment after their initial investigation on November 3, 2000, until November 30, 2000.

A fact question exists as to whether the Board's explanation as to the grounds for termination were made in good faith, or to only comply with the holding in *Celotex*

Corp. v. Catrett, 477 U.S. 317 (1986); *Walsh v. United Parcel Service*, 201 F.3rd 718, 724 (6th Cir. 2000). Macy had never been placed on any corrective action plan for any alleged violations during the entire period of her employment with the Board.

When genuine issues of material fact are unresolvable on the record, an appropriate trial to determine the facts is required. *Board of Education, et al. v. Department of Health, Education & Welfare, et al.*, 532 F.2d 1070 (6th Cir. 1976)

The doctrine of issue preclusion should not effect the decision in this case.

Ms. Macy asserts that the Hopkins County Board of Education wrongfully terminated her employment based upon (1) her ADA protected status, or (2) her EEOC complaint or (3) retaliation for numerous complaints to the Board about her ADA 504 Plan or (4) a combination of one or more of the three.

Issue preclusion is a legal doctrine which prohibits issues which were adjudicated in a previous lawsuit from being relitigated in a subsequent lawsuit. It is distinguished from claim preclusion which requires same identity of parties, same identity of causes of action and that the action was resolved on the merits. *Newman v. Newman*, 451 S.W.2d 417 (Ky. 1970)

Issue preclusion has four essential elements: (1) the issue in the record case is the same as in the first case (Restatement (Second) of Judgments § 27 (1982), (2) the issue must have been actually litigated, (3) even if the issue was actually litigated in a previous action, issue preclusion will not bar subsequent litigation unless the issue was actually decided in that action and (4) for issue preclusion to operate as a bar, the

decision on the issue in the prior action must have been necessary to the Court's judgment. *Yeoman v. Commonwealth Health Policy Bd.*, 983 S.W.2d 459, 465 (Ky. 1998)

Issue preclusion does not apply in this case because the factual and legal issues involved are not identical to the ones addressed in the misdemeanor case or in the other judicial and administrative proceedings. At no time have Ms. Macy's present claims been actually litigated to finality.

The law asks the question whether uncontroverted facts existed at the time of a parties' action, which are relative to the disposition of the pending causes of action, and if material and relevant facts are in issue, then a fact finder must be impaneled to decide what the facts actually are and whether the laws, when applied to those facts, supported the Board of Education's termination of Macy's employment or whether they support Macy's claims that her 19 years of exemplary employment were terminated as a retaliatory act.

Congress has expressed an intent not to allow preclusion in Title VII claims. *University of Tennessee v. Elliott*, 478 U.S. 788, 106 S. Ct. 3220, 3225 (1986). The standard is tied to the challenged retaliatory act, not the underlying conduct that forms the basis of a Title VII complaint. *Burlington Northern, et al. v. White*, 126 S. Ct. 2405 (2006). ADA claim should be treated the same.

At the time of Macy's termination of employment, on November 30, 2000, the Board did not have any legal determination of the alleged underlying conduct; so it is reasonable to find that its actions were based upon her protective status and as a retaliatory act.

The Trial Court's application of the doctrine of issue preclusion constitutes reversible error.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the decision of the Sixth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 06-5722

[Filed April 12, 2007]

SHARON MACY, Plaintiff-Appellant,

v.

HOPKINS COUNTY SCHOOL BOARD OF EDUCATION, Defendant-Appellee.

Appeal from the United States District Court for the Western District of Kentucky at Owensboro. No. 01-00195—E. Robert Goebel, Magistrate Judge.

Before: MOORE and GIBBONS, Circuit Judges; SARGUS, District Judge.*

* The Honorable Edmund A. Sargus, Jr., United States District Judge for the Southern District of Ohio, sitting by designation.

OPINION

KAREN NELSON MOORE, Circuit Judge. Plaintiff-Appellant Sharon Macy ("Macy") appeals the district court's order granting summary judgment to Defendant-Appellee Hopkins County School Board of Education ("the Board"). Macy alleged that the Board violated federal and state law by firing her because she was disabled and in retaliation for protected activities. The Board asserted that Macy was fired for threatening students and making inappropriate remarks about the students and their families, and that this was the latest in a series of incidents of misconduct. The district court granted the Board's motion for summary judgment, concluding that Macy had not introduced direct or circumstantial evidence sufficient for a jury to find that she was fired because of her disability or in retaliation for protected activities. Because Macy has not presented evidence from which a reasonable jury could conclude that the Board's proffered reason for firing her was pretextual, and because Macy has forfeited her retaliation claims and state-law claims, we **AFFIRM** the judgment of the district court.

I. BACKGROUND

Sharon Macy was employed as a physical-education teacher by the Hopkins County School Board of Education from August of 1981 until November 30, 2000. On June 6, 1987, Macy suffered a head injury in a bicycle accident. She returned to work, but aggravated her injuries in another accident in 1996. Soon after, the Board and Macy agreed to implement certain accommodations as a result of Macy's head injuries.

Macy and the Board developed a "Section 504 Individualized Accommodation Plan" ("504 Plan"), which

listed Macy's disabling condition as "post concussive syndrome" and described such symptoms as "[r]ecurrent headaches, difficulty with attention and concentration, short term memory deficits, disrupted sleep, depression and/or anxiety, irritability with others and outbursts of anger." Joint Appendix ("J.A.") at 204, 208. The 504 Plan described the impact of Macy's condition and listed accommodations that the Board and Macy were to implement. For example, the 504 Plan noted that Macy "may need to leave her classroom suddenly due to acceleration of symptoms identified in medical diagnosis" and that her classroom "needs to be as organized and as free from disruptions as possible so that the opportunities for loud disruptions or outbursts are minimal thus decreasing Ms. Macy's chances of becoming frustrated, anxious, or inattentive." J.A. at 205, 209. Additionally, Macy requested that she be allowed to have a colleague present during meetings with parents or administrators "for assurance and retention purposes." J.A. at 206, 210.

Macy complained approximately ten times that Daryl Herring ("Herring"), the principal of the middle school at which Macy worked, did not properly implement the 504 Plan. Each time, Macy contacted assistant superintendent Linda Zellich ("Zellich"), the Board's "point person" for overseeing the 504 Plan. Macy testified that in response to her complaints, Zellich would call Herring or set up a meeting to discuss her complaint. Macy also testified that only once did Zellich not satisfy her complaints-when Macy requested a teacher's aide in August 2000.

On February 21, 2000, Macy filed a complaint with the Equal Employment Opportunity Commission ("EEOC") and the Kentucky Commission on Human Rights. Macy alleged that Herring sent her a letter requesting that she report to work on time and that she complained to Zellich that Herring

did not send similar letters to non-disabled employees who arrive late or sign in late. Macy alleged that Herring later sent her a letter of reprimand purportedly regarding another incident, but stated that she believed Herring's second letter was actually in retaliation for her complaints about the first letter.

On November 1, 2000, Macy was involved in an incident at South Hopkins Middle School, where she worked. As Macy left to go home that afternoon, she saw a group of boys playing basketball outside unsupervised. Macy claims that she brought the boys inside and lectured them about playing outside unsupervised, warning that they could have been seriously injured or killed. The boys claimed that Macy threatened to kill them and reiterated that "she meant it." J.A. at 145 (*Macy v. Stevens*, No. 2001-CA-002756-MR, at 8 (Ky. Ct. App. Dec. 13, 2002)). The boys also claimed that Macy made inappropriate remarks about the marital status of their family members and about their sexual activity, including "derogatory comments about men to the effect that they raped women, that they got them pregnant and then left them." J.A. at 140, 145 (*Macy*, No. 2001-CA-002756-MR, at 3, 8).

Following the incident, Superintendent James Lee Stevens ("Stevens") ordered an investigation into both the incident and any past problems involving Macy. On November 30, 2000, following the investigation, Stevens sent Macy a letter notifying her that, pursuant to KY. REV. STAT. § 161.790(1)(b), her employment contract was terminated effective immediately on the grounds of conduct unbecoming a teacher, citing the November 1 incident as well as thirty-one specific prior incidents.

Macy requested that an administrative tribunal review Stevens's decision, pursuant to KY. REV. STAT.

§ 161.790(3) and (4). *See also* KY. REV. STAT. § 13B.090. After a hearing, the tribunal determined that Macy's principal had failed to notify her properly of charges that she arrived late for work and that at least four infractions described in the termination letter were not supported by the evidence. However, the tribunal also concluded that Macy had indeed committed many of the other alleged infractions. Specifically, the tribunal determined that Macy had left the school building without signing out, pushed a chair off a stage, referred to a student as a "total loser," violated the policy on grades, kicked a trash can in response to student misbehavior, made derogatory comments about a parent and two other employees in front of a classroom of students including the child of the parent, sent a fake detention to the assistant principal, checked out early without ensuring that a fellow employee would cover her bus duty, improperly disciplined students, slammed a book against the floor and made derogatory comments about other employees during a meeting, and made statements that she would not follow discipline policies. J.A. at 119-20 (Tribunal Order at 2-3). Most importantly, the tribunal determined that Macy had actually threatened a group of boys on November 1, 2000, and "also made inappropriate statements about the marital status of children's families and made inappropriate remarks regarding the students' sexual activity." J.A. at 121 (Tribunal Order at 4).

On the basis of the evidence presented, the tribunal "f[ou]nd[] Macy guilty of conduct unbecoming a teacher, and the tribunal impose[d] the punishment of termination of her teaching contract." J.A. at 118 (Tribunal Order at 1). Macy appealed the tribunal's decision to the Hopkins County Circuit Court, *see* KY. REV. STAT. §§ 13B.140 & .150, which affirmed the decision on December 7, 2001. Macy further appealed to the Kentucky Court of Appeals, which affirmed on December 13, 2002. Macy filed a motion for discretionary

review with the Kentucky Supreme Court, which denied the motion on August 17, 2005. On December 14, 2004, during the course of Macy's appeals, the Kentucky Education Professional Standards Board revoked Macy's teaching certificate for a period of ten years.

Meanwhile, Macy faced criminal charges stemming from the November 1, 2000 incident. The parties agree that on November 29, 2000, Macy was charged with nine counts of terroristic threatening in the third degree in violation of KY. REV. STAT. § 508.080.[1] Macy was convicted by a Hopkins County District Court jury. Her conviction was affirmed by the Hopkins County Circuit Court, and both the Kentucky Court of Appeals and the Kentucky Supreme Court denied discretionary review. The United States Supreme Court denied Macy's petition for certiorari. *Macy v. Kentucky*, 542 U.S. 938, 124 S. Ct. 2918, 159 L. Ed. 2d 815 (2004).

Also during this time period, Macy's complaint with the EEOC and the Kentucky Commission on Human Rights was resolved. The Kentucky Commission on Human Rights dismissed Macy's complaint on June 21, 2001, "upon a finding of no probable cause to believe that the Respondent has engaged in an unlawful practice in violation of the Kentucky Civil Rights Act." J.A. at 130-31 (Ky. Comm'n on Human Rights Order). On August 16, 2001, the EEOC also dismissed Macy's complaint, indicating that it had "adopted the findings of the state or local fair employment practices

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[1] The statute states, in relevant part: "(1) ...[A] person is guilty of terroristic threatening in the third degree when: (a) He threatens to commit any crime likely to result in death or serious physical injury to another person or likely to result in substantial property damage to another person...." KY. REV. STAT. § 508.080.

agency that investigated this charge." J.A. at 132 (EEOC Dismissal & Notice of Rights).

On November 15, 2001, Macy filed a pro se complaint in the federal district court against the Hopkins County Board of Education. Through counsel, Macy filed an amended complaint on April 22, 2005, alleging five counts: (1) violation of the Americans with Disabilities Act ("ADA"); (2) retaliation for Macy's complaints regarding implementation of her 504 Plan; (3) retaliation for Macy's complaint filed with the EEOC; (4) discriminatory discharge in violation of the Kentucky Civil Rights Act, KY. REV. STAT. § 344.040; and (5) retaliation in violation of the Kentucky Civil Rights Act, KY. REV. STAT. § 344.280. The Board filed a motion for summary judgment on January 13, 2006. Macy filed a response on February 13, 2006, and the Board filed a reply on February 27, 2006. On May 1, 2006, the district court granted summary judgment for the Board on all claims. Macy timely appealed. After the parties submitted their briefs and the case was set for argument, we sought and received letter briefs regarding whether and to what extent Macy's claims were barred by the doctrine of issue preclusion.

II. ANALYSIS

We review de novo a district court's order granting summary judgment. *DiCarlo v. Potter*, 358 F.3d 408, 414 (6th Cir. 2004). Summary judgment is proper if the evidence, taken in the light most favorable to the nonmoving party, shows that there are no genuine issues of material fact and that the moving party is entitled to a judgment as a matter of law. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986); FED. R. CIV. P. 56(c). "The moving party bears the burden of demonstrating that there are no genuine issues of material

fact, which 'may be discharged by "showing"—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case.'" *Wright v. Murray Guard, Inc.*, 455 F.3d 702, 706 (6th Cir. 2006) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). The nonmoving party must then put forth "significantly probative" evidence supporting its claims in order to defeat summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Of course, we must be mindful that summary judgment is inappropriate whenever the evidence raises a genuine issue of material fact, "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248.

A. ADA Discrimination Claim

The ADA bars employers from "discriminat[ing] against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). "To recover on a claim of discrimination under the [ADA], a plaintiff must show that: 1) he is an individual with a disability; 2) he is 'otherwise qualified' to perform the job requirements, with or without reasonable accommodation; and 3) he was discharged solely by reason of his handicap."[2]

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[2] It appears that every other circuit save one that has addressed the issue has held that an employee may recover under the ADA if the employee's disability was a "motivating factor" in the employer's decision, and that the employee need not establish that he or she was fired "solely" because of his or her disability. *See Head v. Glacier Northwest, Inc.*, 413 F.3d 1053, 1063-65 (9th Cir. 2005);

Monette v. Elec. Data Sys. Corp., 90 F.3d 1173, 1178 (6th Cir. 1996).

Macy attempts to meet this burden by presenting circumstantial evidence of discrimination,[3] requiring us to

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Parker v. Columbia Pictures Indus., 204 F.3d 326, 336-37 (2d Cir. 2000); *Baird ex rel. Baird v. Rose*, 192 F.3d 462, 468-70 (4th Cir. 1999); *Foster v. Arthur Andersen, LLP*, 168 F.3d 1029, 1033-34 (7th Cir. 1999); *Newberry v. E. Tex. State Univ.*, 161 F.3d 276, 279 (5th Cir. 1998); *McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068, 1073-77 (11th Cir. 1996), *cert. denied*, 520 U.S. 1228, 117 S. Ct. 1819, 137 L. Ed. 2d 1028 (1997); *Katz v. City Metal Co.*, 87 F.3d 26, 33 (1st Cir. 1996); *Pedigo v. P.A.M. Transp., Inc.*, 60 F.3d 1300, 1301-02 (8th Cir. 1995). *But see Fitzgerald v. Corr. Corp. of Am.*, 403 F.3d 1134, 1144 (10th Cir. 2005) ("Under either the ADA or the Rehabilitation Act, [the plaintiff] is obligated to show that he was 'otherwise qualified' for the benefits he sought and that he was denied those 'solely by reason of disability.'"). However, we have reaffirmed that *Monette* requires that a plaintiff demonstrate that "disability was the sole reason for the adverse employment action." *Hedrick v. W. Reserve Care Sys.*, 355 F.3d 444, 454 (6th Cir.), *cert. denied*, 543 U.S. 817, 125 S. Ct. 68, 160 L. Ed. 2d 25 (2004). It appears that we adopted this requirement from the standards which apply to the Rehabilitation Act, which by its terms bars discrimination against a person with a disability "solely by reason of her or his disability." 29 U.S.C. § 794(a). The ADA, on the other hand, bars discrimination "because of the disability," with no mention of the word "solely." 42 U.S.C. § 12112(a). We are, of course, currently bound by *Monette* and *Hedrick*, *see Salmi v. Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985); 6th Cir. R. 206(c) ("Reported panel opinions are binding on subsequent panels."), whether the reasoning set forth in those opinions was correct or not.

[3] Macy argued below that she had presented direct evidence of discrimination, but mentions this argument in her brief on appeal in

apply the familiar *McDonnell Douglas* burden-shifting framework. "On a motion for summary judgment, a district court considers whether there is sufficient evidence to create a genuine dispute at each stage of the *McDonnell Douglas* inquiry." *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 661 (6th Cir. 2000). Thus, the plaintiff must first submit evidence from which a reasonable jury could conclude that a prima facie case of discrimination has been established. *Monette*, 90 F.3d at 1186. The defendant must then offer sufficient evidence of a legitimate, nondiscriminatory reason for its action. *Id.* If the defendant does so, the plaintiff must identify evidence from which a reasonable jury could conclude that the proffered reason is actually a pretext for unlawful discrimination. *Id.* Although the burdens of

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only one sentence, and only in passing. *See* Appellant's Br. at 19 ("The District Court, however, found that Macy's direct evidence required it '...to draw an inference in order to prove the existence of a fact'; and thus no direct evidence existed that her termination was 'solely' due to her ADA post concussive syndrome."). Accordingly, this argument is forfeited, and we do not address it here. *See United States v. Reed*, 167 F.3d 984, 993 (6th Cir.), *cert. denied*, 528 U.S. 897, 120 S. Ct. 229, 145 L. Ed. 2d 192 (1999). Macy's counsel attempted to raise this issue again at oral argument, but oral argument generally cannot resurrect issues forfeited in briefs. *See Hamilton v. Morgan*, 474 F.3d 854, 861 n.5 (6th Cir. 2007); *cf. United States v. Harper*, 246 F.3d 520, 522, 529 (6th Cir. 2001) (considering the merits of an issue raised for the first time at oral argument because intervening changes in case law affected the issue and counsel notified the court beforehand of counsel's intention to raise the issue at oral argument), *overruled on other grounds by United States v. Leachman*, 309 F.3d 377, 384 n.7 (6th Cir. 2002). To the extent that Macy merely restates her argument that firing her because of her behavior was improper because her behavior was due to her disability, this argument is addressed *infra*, Section II.A.2.

production shift, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981).

1. Prima Facie Case

"The burden of establishing a prima facie case of disparate treatment is not onerous." *Id.* Generally, at the summary judgment stage, a plaintiff's burden is merely to present evidence from which a reasonable jury could conclude that the plaintiff suffered an adverse employment action "under circumstances which give rise to an inference of unlawful discrimination."[4] *Id.* Thus, a plaintiff normally must show that he or she: 1) is a member of a protected class; 2) was qualified for the position; 3) suffered an adverse employment action; and 4) suffered such action under circumstances which give rise to an inference of unlawful discrimination. *See McDonnell Douglas Corp. v. Green*, 411

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[4] In *Burdine*, the Supreme Court stated that a plaintiff must "prove by a preponderance of the evidence" the elements of a prima facie case in order to meet his or her burden. *Burdine*, 450 U.S. at 253. However, the Court was reviewing a bench trial, not a motion for summary judgment, and we have since made clear that a district court's duty in reviewing a motion for summary judgment is to "determine[] if a plaintiff has put forth sufficient evidence for a reasonable jury to find her to have met the prima facie requirements." *Cline*, 206 F.3d at 661; *see also St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509-10, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993) (stating that a question of fact remains for the jury if "reasonable minds could differ as to whether a preponderance of the evidence establishes the facts of a prima facie case") (emphasis removed).

U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); *Monette*, 90 F.3d at 1177-86. The Supreme Court and this court have set forth a number of more specific ways by which a plaintiff may satisfy these elements, particularly the fourth element. *See, e.g., O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 313, 116 S. Ct. 1307, 134 L. Ed. 2d 433 (1996) (concluding that a plaintiff alleging age discrimination may satisfy the fourth element by introducing evidence that the plaintiff was replaced by someone "substantially younger"); *McDonnell Douglas*, 411 U.S. at 802 (concluding that a plaintiff turned down for a job may show "that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications"); *Wright*, 455 F.3d at 707 (concluding that a fired plaintiff may show that "'he or she was replaced by someone outside the protected class or was treated differently than similarly-situated, non-protected employees'" (quoting *DiCarlo v. Potter*, 358 F.3d 408, 415 (6th Cir. 2004))); *Monette*, 90 F.3d at 1185 (concluding that a plaintiff alleging discrimination on the basis of disability may show that "after rejection or termination the position remained open, or the disabled individual was replaced"). We must keep in mind, however, that these are merely various context-dependent ways by which plaintiffs *may* establish a prima facie case, and not rigid requirements that all plaintiffs with similar claims must meet regardless of context. *See McDonnell Douglas*, 411 U.S. at 802 n.13 ("The facts necessarily will vary in [employment discrimination] cases, and the specification above of the prima facie proof required from [a plaintiff] is not necessarily applicable in every respect to differing factual situations."). The key question is always whether, under the particular facts and context of the case at hand, the plaintiff has presented sufficient evidence that he or she suffered an adverse employment action under

circumstances which give rise to an inference of unlawful discrimination. *Burdine*, 450 U.S. at 253.

Under the facts of this case, the prima facie case formulation set forth in *Monette* applies quite well. In order to establish a prima facie case of discrimination in violation of the ADA in this context, a plaintiff must show that: "1) he or she is disabled; 2) otherwise qualified for the position, with or without reasonable accommodation; 3) suffered an adverse employment decision; 4) the employer knew or had reason to know of the plaintiff's disability; and 5) the position remained open while the employer sought other applicants or the disabled individual was replaced." *Monette*, 90 F.3d at 1186. In its summary judgment motion below, the Board did not argue that Macy had not introduced sufficient evidence of a prima facie case. On appeal, the Board asserts that it did not concede that Macy had established a prima facie case, but does not address the elements of a prima facie case and argues only that the Board had a legitimate reason for firing Macy. We are mindful that "when assessing whether a plaintiff has met her employer's legitimate expectations at the prima facie stage of a termination case, a court must examine plaintiff's evidence independent of the nondiscriminatory reason 'produced' by the defense as its reason for terminating plaintiff." *Cline*, 206 F.3d at 660-61. Accordingly, we treat Macy's prima facie case as conceded for purposes of this appeal.

2. Legitimate, Nondiscriminatory Reason

The Board introduced evidence that Macy was fired because she threatened to kill a group of boys, made inappropriate remarks about the marital status of the boys' family members, and made inappropriate remarks about the boys' sexual activity, and that this incident was consistent

with a number of prior incidents of inappropriate conduct. Macy argues that this is not a legitimate, nondiscriminatory reason because her "verbal outbursts, anxiety, anger and...irritability" are symptomatic behaviors of her disability and, therefore, the Board's proffered reason actually concedes that she was fired because of her disability. Appellant's Br. at 18. However, this court has repeatedly stated that an employer may legitimately fire an employee for conduct, even conduct that occurs as a result of a disability, if that conduct disqualifies the employee from his or her job. *See Sullivan v. River Valley Sch. Dist.*, 197 F.3d 804, 813 (6th Cir. 1999), *cert. denied*, 530 U.S. 1262, 120 S. Ct. 2718, 147 L. Ed. 2d 983 (2000); *Brohm v. JH Props., Inc.*, 149 F.3d 517, 521-22 (6th Cir. 1998); *Mararri v. WCI Steel, Inc.*, 130 F.3d 1180, 1182-83 (6th Cir. 1997); *Maddox v. Univ. of Tenn.*, 62 F.3d 843, 845-48 (6th Cir. 1995). Accordingly, the Board has offered a legitimate, nondiscriminatory reason for firing Macy.

3. Pretext

A plaintiff may demonstrate that an employer's proffered legitimate reason for an adverse employment action is pretextual on any of three grounds: 1) by showing that the reason has no basis in fact; 2) by showing that the reason did not actually motivate the employer's action; or 3) by showing that the reason was insufficient to motivate the action. *Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994). Macy attempts to attack the Board's proffered reason on all three grounds, but her evidence is insufficient to survive the Board's motion for summary judgment on each ground.

a. No Basis In Fact

Macy first argues that the Board's proffered reason is pretextual because it has no basis in fact. That is, Macy attempts to introduce "evidence that the proffered bases for [her] discharge never happened, *i.e.*, that they are 'factually false.'" *Id.* (quoting *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1124 (7th Cir. 1994)). In her deposition, Macy testified that she did not threaten to kill the group of boys on November 1, 2000, and did not make inappropriate remarks about the boys or their families. Macy also testified that she admitted seven of the thirty-one additional incidents listed in her termination letter, although she denied some of the particular facts asserted about those seven incidents.

Normally, Macy's deposition testimony that a number of the incidents relied on by the Board in firing her did not occur as described by the Board, including the November 1, 2000 incident upon which the Board primarily relied, could be sufficient to create a genuine issue of material fact regarding whether these parts of the Board's proffered reason were pretextual. *Cf. Abbott v. Crown Motor Co.*, 348 F.3d 537, 544 (6th Cir. 2003) (concluding that summary judgment was improper because "both plaintiff's testimony and that of another witness dispute [the] proffered reason"). However, in this case, Macy is precluded from arguing that the underlying incidents did not occur by the doctrine of issue preclusion.[5]

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[5] Neither party raised issue preclusion in this appeal, and "[c]ourts generally lack the ability to raise an affirmative defense sua sponte." *Hutcherson v. Lauderdale County, Tenn.*, 326 F.3d 747, 757 (6th Cir. 2003). However, "where a purely legal issue provides alternative grounds to uphold the judgment of the district court, we may reach the issue, provided the record permits its resolution as

Under Kentucky law, issue preclusion applies only if four elements are met:

> First, the issue in the second case must be the same as the issue in the first case. Second, the issue must have been actually litigated. Third, even if an issue was actually litigated in a prior action, issue preclusion will not bar subsequent litigation unless the issue was

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a matter of law. Furthermore, we have not failed to exercise our discretion to reach an issue that the parties have not briefed where it involves a 'pure question of law that cries out for resolution.'" *Id.* at 756 (citations omitted) (quoting *Rybarczyk v. TRW, Inc.*, 235 F.3d 975, 984 (6th Cir. 2000)) (raising the issue of res judicata sua sponte). Moreover, the Supreme Court has indicated that courts may raise preclusion sua sponte in "special circumstances," in no small part because preclusion doctrine "is not based solely on the defendant's interest in avoiding the burdens of twice defending a suit, but is also based on the avoidance of unnecessary judicial waste." *Arizona v. California*, 530 U.S. 392, 412, 120 S. Ct. 2304, 147 L. Ed. 2d 374 (2000).

We believe that this case presents such special circumstances. The Board complied with Federal Rule of Civil Procedure 8(c) by raising issue preclusion in its answer to Macy's amended complaint, and raised it again in its motion for summary judgment in the district court. Moreover, we asked for and received letter briefs from the parties on issue preclusion as well. Thus, Macy was put on notice of the defense and had an opportunity to respond, both in the district court and on appeal. Macy has already litigated the underlying issue twice, and has not presented any new evidence or any other reason suggesting why litigating it a third time would be appropriate. Resolution of the preclusive effect of the state-court judgments at issue presents a pure question of law and does not require us to resolve any factual disputes. Accordingly, we address issue preclusion here.

> actually decided in that action. Fourth, for issue preclusion to operate as a bar, the decision on the issue in the prior action must have been necessary to the court's judgment.

Yeoman v. Commonwealth, 983 S.W.2d 459, 465, 45 13 Ky. L. Summary 36 (Ky. 1998). Federal courts must give the same preclusive effect to a state-court judgment as that judgment receives in the rendering state. 28 U.S.C. § 1738. Moreover, although § 1738 does not apply to decisions of state administrative tribunals, "when a state agency 'acting in a judicial capacity...resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate,' federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in the State's courts." *Univ. of Tenn. v. Elliott*, 478 U.S. 788, 799, 106 S. Ct. 3220, 92 L. Ed. 2d 635 (1986) (quoting *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422, 86 S. Ct. 1545, 16 L. Ed. 2d 642, 176 Ct. Cl. 1391 (1966)).

Two state decisions preclude Macy from arguing that the Board's proffered reason had no basis in fact. First, Macy admits that she was convicted by a Hopkins County District Court jury of nine counts of terroristic threatening in violation of KY. REV. STAT. § 508.080, and that this judgment was upheld on appeal through the Kentucky court system. Thus, whether or not Macy actually threatened to kill the boys is an issue that was litigated, decided, and was necessary for the judgment in Macy's Kentucky criminal case. Accordingly, she is precluded from arguing in federal court that she did not actually threaten to kill the boys.

Second, an administrative tribunal also determined that Macy had actually threatened to kill the boys. Moreover, the tribunal determined that Macy had made inappropriate

comments to the boys and had committed a number of the other instances of conduct unbecoming a teacher described in Macy's termination letter.[6] The tribunal concluded that "[t]he seriousness of the misconduct of threatening to kill students in itself warrants termination, and the other instances of conduct unbecoming a teacher show a pattern of misconduct and serve to reinforce that sanction." J.A. at 123 (Tribunal Order at 6). This determination was also upheld on appeal through the Kentucky court system. Thus, whether or not Macy actually committed those particular infractions and whether they constituted legal cause for termination under Kentucky law are issues that were litigated, decided, and were necessary for the judgment in Macy's administrative case. Accordingly, she is precluded from arguing in federal court that she did not actually commit those infractions and that the Board's proffered reason has no basis in fact.[7] *Cf. Wicker v. Bd. of Ed.*, 826 F.2d 442, 447-49 (6th Cir. 1987) (concluding that Kentucky state-court decisions precluded a fired superintendent from relitigating whether he actually mishandled the school system's financial affairs and whether that was legal grounds for termination).

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[6] It is worth noting that Macy admitted a number of these infractions in her deposition testimony. *See* J.A. at 87-89 (Macy Dep. at 37-47).

[7] In its letter brief, the Board argues that Macy is also precluded from litigating the issue of whether the Board unlawfully discriminated against her because she has already litigated that issue in state court. However, the state-court decisions make clear that the administrative tribunal did not decide that issue. *See* J.A. at 142-43 (*Macy*, No. 2001-CA-002756-MR, at 5-6) (affirming the hearing officer's determination "that the ADA was not applicable law" in the administrative tribunal review of Macy's termination).

b. Did Not Actually Motivate

Next, Macy argues that parts of the Board's proffered reason—specifically, all of the alleged incidents prior to the November 1, 2000 incident—are pretextual because they did not actually motivate the Board's decision to fire her. For the purposes of this argument, "the plaintiff admits the factual basis underlying the employer's proffered explanation and further admits that such conduct *could* motivate dismissal." *Manzer*, 29 F.3d at 1084. Nevertheless, the plaintiff argues that the proffered reason is pretextual by "attempt[ing] to indict the credibility of his employer's explanation by showing circumstances which tend to prove that an illegal motivation was *more* likely than that offered by the defendant." *Id.* That is, "the plaintiff argues that the sheer weight of the circumstantial evidence of discrimination makes it 'more likely than not' that the employer's explanation is a pretext, or coverup." *Id.*

Macy argues that "the Board's use of other alleged factors, accumulated over an extended period of time, to justify her termination is less than credible." Appellant's Br. at 17. Macy notes that she "had never been placed on any corrective action plan for any alleged violations during the entire period of her employment with the Board." *Id.* at 20-21; *see also* J.A. at 218 (Woodward Dep. at 243) (stating that "problems with a teacher or that teacher's abilities" would be reflected in a corrective action plan). Although "failure to follow internal procedures can be *evidence* of pretext," *Felder v. Nortel Networks Corp.*, 187 F. App'x 586, 595 (6th Cir. 2006) (unpublished opinion) (emphasis added); *see also Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 267, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977) (noting, in the context of reviewing a zoning decision, that "[d]epartures from the normal procedural sequence also might afford

evidence that improper purposes are playing a role"), such a failure is, by itself, "generally insufficient to support a finding of pretext," *White v. Columbus Metro. Hous. Auth.*, 429 F.3d 232, 246 (6th Cir. 2005). In this case, Stevens testified that the information about the prior incidents was collected because he ordered an investigation in response to the November 1, 2000 incident, in order to help him make a decision on how to respond to the incident. The only evidence in the record on this issue shows that Macy was not fired on the basis of a collection of incidents newly brought to her attention—a situation which might very well create a triable issue of pretext—but was fired instead on the basis of a significant incident and a resulting investigation showing that that incident was not an isolated occurrence. Because Macy has not presented any evidence to the contrary, she has not established a triable issue that the Board's proffered reasons did not actually motive the decision to fire her.

c. Insufficient to Motivate

Finally, Macy argues that the Board's proffered reason is pretextual because it was insufficient to motivate the decision to fire her. This argument does not necessarily require that a plaintiff show that her employer did not have legal cause to fire her, but instead, "ordinarily, consists of evidence that other employees, particularly employees not in the protected class, were not fired even though they engaged in substantially identical conduct to that which the employer contends motivated its discharge of the plaintiff." *Manzer*, 29 F.3d at 1084; *cf. Thomas v. Contoocook Valley Sch. Dist.*, 150 F.3d 31, 42 (1st Cir. 1998) (noting that the resolution of an employment discrimination case turns on the employer's actual motivation for firing an employee, as opposed to whether the employer had legal cause to fire the employee). We have explained that this standard requires a plaintiff to

introduce evidence sufficient to enable a reasonable jury to conclude that the employees are "similar 'in all of the *relevant* aspects.'" *Johnson v. Kroger Co.*, 319 F.3d 858, 867 (6th Cir. 2003) (quoting *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 352 (6th Cir. 1998) (internal quotation marks omitted)). "[T]he relevant factors...often include the employees' supervisors, the standards that the employees had to meet, and the employees' conduct. But the weight to be given to each factor can vary depending upon the particular case." *Id.* (internal citations and parentheticals omitted). Moreover, because we are reviewing an order granting summary judgment, we must draw all reasonable inferences in favor of Macy. *See DiCarlo*, 358 F.3d at 414.

Macy argues that "[t]he Board's disparative [sic] treatment of Macy, compared to other Board employees, is stark," Appellant's Br. at 22, and at oral argument, Macy's counsel identified Patricia Bush ("Bush") as a nondisabled employee treated differently for substantially similar conduct. Bush was disciplined for telling a teacher's aide that she would "kill" a student if the aide did not remove the student from the room. J.A. at 167 (Stevens Dep. at 96). Bush made this statement in the presence of students, at least one of whom overheard her comment. Macy argued below that Stevens treated Bush differently by not reviewing Bush's history and by suspending Bush rather than firing her.

From the evidence that Macy presented, it appears possible that Macy and Bush are similar in many relevant respects. Specifically, both Bush and Macy were teachers in the same school district. Although Macy has not pointed to evidence that they worked in the same school, both were disciplined by Superintendent Stevens, who had ultimate supervisory and decision-making authority over both of them.

Perhaps most importantly, both Bush and Macy stated that they would kill a student.

Because incidents of misconduct giving rise to discipline form the crux of the similarities between Bush and Macy, the degree of their misconduct is a factor to be given great weight in this case. *See Johnson*, 319 F.3d at 867. This does not require that Macy introduce evidence showing that Bush engaged in identical conduct, but merely that Bush engaged in conduct of "comparable seriousness." *See McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 283 n.11, 96 S. Ct. 2574, 49 L. Ed. 2d 493 (1976) ("[P]recise equivalence in culpability between employees is not the ultimate question: as we indicated in *McDonnell Douglas*, an allegation that other 'employees involved in acts against (the employer) of Comparable seriousness...were nevertheless retained...' is adequate to plead an inferential case that the employer's reliance on his discharged employee's misconduct as grounds for terminating him was merely a pretext." (quoting *McDonnell Douglas*, 411 U.S. at 804) (alteration in original)); *Wright*, 455 F.3d at 710 ("In the disciplinary context, we have held that to be found similarly situated, the plaintiff and his proposed comparator must have engaged in acts of '*comparable seriousness*.'"). However, the only evidence that Macy has pointed to concerning the incident involving Bush is parts of two pages of Stevens's deposition testimony. Stevens testified that Bush made a "threatening comment" and used the word "kill" in talking to a teacher's aide in reference to a student and that at least one student overheard this, but Stevens did not provide any further details about the circumstances of that incident. Macy did not introduce testimony from Bush, the teacher's aide, or the student, or any other additional evidence about the incident. Macy also did not argue that she should be granted more time

pursuant to Federal Rule of Civil Procedure 56(f) to secure such evidence.

Although it is possible that these two incidents were of comparable seriousness, absent additional evidence, a jury could reach such a conclusion only by filling in the details with speculation. For example, the lack of evidence suggests at least two possible important differences between the two incidents. First, Macy directly threatened to kill a group of students, but Bush made her threatening statement about a student to a teacher's aide. That difference might be inconsequential in many cases, but Macy also has not pointed to evidence showing that the student that Bush allegedly threatened heard Bush's comment, or was even in the room when the comment was made.[8] We must draw all reasonable inferences in favor of Macy, but Macy has not pointed to any evidence from which a jury could infer that the student heard Bush's comment, and such a conclusion would thus be a guess, not an inference. Because making threatening comments about a student outside of the student's presence is conduct significantly less serious than directly threatening a group of students, the limited evidence presented is not sufficient for a reasonable jury to conclude that Macy was

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[8] The administrative tribunal also concluded that Macy had committed a number of other infractions, which in many cases would conclusively establish that Bush and Macy were not similar in all relevant aspects. However, the other incidents came to Stevens's attention because of the investigation that he ordered into Macy's work performance. Stevens did not order a similar investigation into Bush's work performance. Thus, if a reasonable jury could conclude that Bush and Macy engaged in conduct of comparable seriousness, the jury could also conclude that Stevens's decision to investigate and eventually fire Macy but not to investigate Bush shows that the proffered reason was pretextual.

treated differently in a similar situation.[9] Thus, Macy has not presented evidence from which a reasonable jury could conclude that the Board's proffered reason was pretextual. Accordingly, we affirm the district court's decision granting summary judgment to the Board on Macy's ADA discrimination claim.

B. Retaliation Claims

Macy alleged in her amended complaint that the Board retaliated against her for her complaints that her 504 Plan was not being implemented correctly and because she filed a complaint with the EEOC. Macy has not identified the law upon which her retaliation claims are based, and Macy has

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[9] We do not mean to suggest that the only way that Macy could have survived the Board's motion for summary judgment on this issue was by showing that Bush's statement was overheard by the student and was thus functionally the same as a direct threat. Because "precise equivalence in culpability" is not required, *McDonald*, 427 U.S. at 283 n.11, Macy needed only to introduce evidence from which a reasonable jury could infer that Bush's conduct was of comparable seriousness. For example, Macy could have introduced evidence from which a reasonable jury could infer that Bush's comment was as or more harmful to those who heard it as Macy's comment was to the group of boys that she threatened, *see Clayton v. Meijer, Inc.*, 281 F.3d 605, 612 (6th Cir. 2002), or evidence that Bush was or could have been charged with as serious a crime as the terroristic-threatening-in-the-third-degree charge that Macy faced, *see Harrison v. Metro. Gov't of Nashville & Davidson County, Tenn.*, 80 F.3d 1107, 1115-16 (6th Cir.), *cert. denied*, 519 U.S. 863, 117 S. Ct. 169, 136 L. Ed. 2d 111 (1996), *overruled on other grounds by Jackson v. Quanex Corp.*, 191 F.3d 647, 667 n.6 (6th Cir. 1999). However, Macy has not pointed to this type of evidence or any other evidence from which a reasonable jury could conclude that Bush's conduct was as serious as Macy's.

not attempted to develop her retaliation claims on appeal. Accordingly, those claims are forfeited. *See United States v. Reed*, 167 F.3d 984, 993 (6th Cir.), *cert. denied*, 528 U.S. 897, 120 S. Ct. 229, 145 L. Ed. 2d 192 (1999). Macy's retaliation claims also fail on the merits. This court has noted that the "essence" of a retaliation claim "is that the plaintiff engaged in conduct protected by the Constitution or by statute, the defendant took an adverse action against the plaintiff, and this adverse action was taken (at least in part) because of the protected conduct." *Thaddeus-X v. Blatter*, 175 F.3d 378, 386-87 (6th Cir. 1999) (en banc). Macy has satisfied the first two elements, but has not introduced any evidence that her firing was in retaliation for protected conduct beyond the evidence that she introduced in support of her ADA discrimination claim, which does not suggest retaliation. Accordingly, no reasonable jury could conclude on the evidence in the record that Macy was fired in retaliation for protected conduct, and we affirm the district court's decision granting summary judgment to the Board on Macy's retaliation claims.

C. State-Law Claims

Macy has not cited Kentucky law or even mentioned her state-law claims on appeal. Accordingly, those claims are forfeited. *See Reed*, 167 F.3d at 993.

Macy's state-law claims fail on the merits as well. "We interpret Kentucky protections for the disabled consonant with the federal Americans with Disabilities Act." *Henderson v. Ardco, Inc.*, 247 F.3d 645, 649 (6th Cir. 2001). Thus, the same analysis that applies to Macy's federal claims applies to her state-law claims, and we affirm the district court's decision granting summary judgment to the Board on Macy's state-law claims.

III. CONCLUSION

Because Macy has not presented evidence from which a reasonable jury could conclude that the Board's proffered reason for firing her was pretextual, and because Macy has forfeited her retaliation claims and state-law claims, we **AFFIRM** the judgment of the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

CIVIL ACTION NO. 4:01CV-00195-ERG

[Filed May 1, 2006]

SHARON MACY,)
PLAINTIFF,)
)
vs.)
)
HOPKINS COUNTY)
BOARD OF EDUCATION,)
DEFENDANT.)
)

MEMORANDUM OPINION

BACKGROUND

Before the Court is Defendant's motion for summary judgment (DN 46). Plaintiff has filed a response in opposition to the motion (DN 50) and Defendant has filed a reply memorandum (DN 51).

In her amended complaint Plaintiff, Sharon Macy ("Macy"), alleges wrongful termination by Defendant, the Hopkins County Board of Education ("Board of Education"),

in violation of the Americans with Disabilities Act ("ADA") and KRS 344.040 as well as retaliatory discharge in violation of KRS 344.280 (DN 35). Having been fully briefed, these matters are now ripe for disposition.

STANDARD OF REVIEW

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment is appropriate if "the pleadings depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The inquiry under Rule 56(c) is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *see also Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989). "The plain language of Rule 56(c) mandates the entry of summary judgment...against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial..." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

The party seeking summary judgment bears the initial burden of informing the Court of the basis of its motion and demonstrating the absence of any genuine issue of material fact. *Celotex*, 477 U.S. at 322-323. Once the moving party satisfies this burden, the burden shifts to the non-moving party to demonstrate there is a genuine issue of fact for trial. *Anderson*, 477 U.S. at 247-248. Although the Court must review the evidence in a light most favorable to the non-

moving party, the non-moving party is required to do more than simply show that there is some "metaphysical doubt as to the material facts." *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). Rule 56 requires the non-moving party to present "*specific facts* showing there is a *genuine* issue for trial," by affidavit, depositions, answers to interrogatories, and/or admissions on file. Fed.R.Civ.P.56(c) and (e) (emphasis added); *Celotex*, 477 U.S. at 324. The substantive law governing the case will determine what issues of fact are material. *Street*, 886 F.2d at 1479-1480. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, the motion for summary judgment should be granted." *Pitts v. Michael Miller Car Rental*, 942 F.2d 1067, 1069-1070 (6th Cir. 1991) (citing *Matsushita Elec. Ind. Co.*, 475 U.S. at 586).

STATEMENT OF THE FACTS

Plaintiff, Sharon Macy ("Macy"), was employed as a physical education teacher by Defendant, Hopkins County Board of Education ("Board of Education"), from August of 1981 through November 30, 2000. On June 6, 1987, Macy sustained a severe closed head injury while making a cross-country bike trek with her twin sister.[1] Remarkably, Macy returned to teaching in August of 1987 (DN 46, Exhibit 1, Deposition of Macy at 18). An automobile accident in 1995 apparently exacerbated the closed head injuries Macy suffered in 1987 (DN 35, Amended Complaint at Paragraph 6).

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[1] Macy's bike fell into the roadway where a passing car clipped or ran over the back part of her head (DN 46, Exhibit 1, Deposition of Macy at 18).

In 1996, the Board of Education determined Macy needed certain accommodations in the workplace as a result of her closed head injuries. Assistant Superintendent, Linda Zellich ("Zellich"), and Kevin Sloan, a teacher's advocate for the Kentucky Education Association ("KEA"), were involved in the creation of the "504 Individualized Accommodation Plan" ("504 Plan")[2] that set forth workplace accommodations for Macy (DN 46, Exhibit 3, Zellich Deposition at 59-68; DN 50, Exhibit 1). Ms. Zellich was also involved in subsequent modifications to the 504 Plan and overseeing the 504 Plan (DN 46, Exhibit 3, Zellich Deposition at 59-68, 84). Ms. Zellich understood the 504 Plan was being implemented due to Macy having difficulty maintaining attention, headaches, short-term memory deficits, disruptive sleep, depression, difficulty controlling irritability, outbursts with others, and anger (DN 46, Exhibit 3, Zellich Deposition at 80-81).

The 504 Plan acknowledges that Macy's disabling condition is a "post concussive syndrome" caused by a closed head injury (DN 50, Exhibit 1). It describes her symptoms as "recurrent headaches, difficulty with attention and concentration, short term memory deficits, disrupted sleep,

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[2] In essence, § 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of disability in "any program or activity receiving Federal financial assistance..." 29 U.S.C. § 794(a). Most commonly, parents and the local education agency work together to formulate a § 504 Individualized Accommodation Plan for each handicapped child's education. *See e.g. Howell By Howell v. Waterford Public Schools*, 731 F. Supp. 1314 (E.D. Mich. 1990). Here, one of the school psychologists and/or a special ed teacher suggested a § 504 Individualized Accommodation Plan be developed to address Macy's needs due to her closed head injuries (DN 46, Exhibit 1, Macy Deposition at 18-20; DN 46, Exhibit 3, Zellich deposition at 58-60).

depression and/or anxiety, irritability with others and outbursts of anger" (DN 50, Exhibit 1). If Plaintiff experienced a headache, the 504 Plan accommodated her by having a staff member take over her class while she went to an available designated area with a cot where she could recline and relax (DN 46, Exhibit 1, Macy Deposition at 20; DN 50, Exhibit 1 at Page 3). Another accommodation under the 504 Plan involved directing students going to the vocal music and band room to use the outside exit so that they do not pass through the gymnasium during Macy's physical education classes (DN 50, Exhibit 1 at 3). This accommodation was intended to "eliminate confusion, disruptions, and minimize the opportunity for horseplay" (DN 50, Exhibit 1 at 3). During her deposition, Macy indicated another accommodation under the 504 Plan involved her covering detention in the afternoons so she could avoid high noise level areas (DN 46, Exhibit 1, Macy Deposition at 20). Notably, during her deposition, Macy conceded that the 504 Plan did not allow her to engage in any criminal activity or conduct that violated Kentucky laws for teachers (DN 46, Exhibit 1 at 20).

Daryl Herring ("Herring") was the Principal of the school where Macy taught physical education. Mr. Herring understood the 504 Plan was being implemented because Macy experienced severe headaches, outbursts of anger, irritability, difficulty with concentration and memory loss (DN 46, Exhibit 4, Herring Deposition at 14-15).

There is no dispute that Macy repeatedly complained about Mr. Herring not following or carrying out provisions of her 504 Plan (DN 46, Exhibit 1, Macy Deposition at 21-22; Exhibit 3, Zellich Deposition at 82-83). Macy made her complaints to Zellich and KEA representatives (DN 46, Exhibit 3, Zellich Deposition at 85).

On February 21, 2000, Macy filed a complaint with the Equal Employment Opportunity Commission and the Kentucky Commission on Human Rights ("The EEOC Complaint") (DN 46, Exhibit 1, Macy Deposition at 57-58). In her complaint Macy alleged the Board of Education had not made all of the agreed to necessary accommodations that address her disability (DN 46, Exhibit 1, Macy Deposition Exhibit No. 4). Additionally, Macy accused Herring, the school Principal, of singling her out for being tardy on September 1, 1999 and, after she complained to the Assistant Superintendent, retaliating against her on November 23, 1999, by sending out a letter of reprimand regarding an incident that allegedly occurred on November 5, 1999 (DN 46, Exhibit 1, Macy Deposition Exhibit No. 4). Macy alleged discrimination in violation of the ADA, KRS 344.040, and KRS 344.280 (DN 46, Exhibit 1, Macy Deposition Exhibit No. 4).

In the late afternoon of November 1, 2000, an incident occurred at school that involved Macy and nine members of the middle school basketball team. As Macy left the school building to head home, she encountered some unsupervised boy basketball players outside of the building (DN 46, Exhibit 1, Macy Deposition at 28). She directed the boys to go back inside to the gym where they would be supervised (DN 46, Exhibit 1, Macy Deposition at 28). Macy recalls giving the boys a lecture about playing outside unsupervised (DN 46, Exhibit 1, Macy Deposition at 28-29). During this lecture Macy claims she told the boys that they could have been seriously hurt or killed because they were flipping around on the poles (DN 46, Exhibit 1, Macy Deposition at 29). The boys recall Macy threatened to "kill" them if she heard them making fun of the girls and that she repeated this threat, saying that she "meant it" (DN 46, Exhibit No. 8 at Page 8).

Following the above incident, the Superintendent, James Lee Stevens ("Superintendent Stevens"), conducted an investigation with the help of Assistant Superintendents Lany Woodward and Zellich, as well the Board of Education attorney, J. Keith Cartwright (DN 46, Exhibit 2, Stevens Deposition at 80-82, 99-100, 102-103). After completing the investigation, Superintendent Stevens notified Macy by letter, dated November 30, 2000, that her contract of employment was being terminated effective that date on the grounds that she engaged in conduct unbecoming a teacher (DN 46, Exhibit 2, Macy Deposition Exhibit No. 1). In relevant part, the letter reads as follows:

> "Specifically, our investigation reveals that on November 1, 2000 you have threatened to kill students, you have made inappropriate remarks about the marital status of children's family members, you have made inappropriate sexual remarks, and you have had a pattern and history of conduct which is inappropriate and unbecoming.
>
> This is the most recent incident in which you made inappropriate remarks to students. It is the latest in a series of incidents which is the basis for our decision to terminate your contract and employment with the Hopkins County Board of Education. In addition to the above allegations, our investigation and your records indicate additional actions which are unbecoming to a teacher including but not limited to the following..."

(DN 46, Exhibit 1, Macy Deposition Exhibit No. 1 at Page 1). The letter then identifies thirty-one additional incidents of behavior deemed unbecoming a teacher under KRS

161.790(1)(b) (DN 46, Exhibit 1, Macy Deposition Exhibit No. 1 at Pages 1-4).

Meanwhile, on November 29, 2000, Macy was formally charged in the Hopkins District Court with nine counts of terroristic threatening in the third degree, a class A misdemeanor, because of her threats to "kill" the nine boys. While Macy denies threatening to kill the boys, she concedes all nine of the students so testified during a criminal trial before the Hopkins District Court (DN 46, Exhibit 1, Macy Deposition at 29-32). Macy also acknowledges the jury found her guilty of nine counts of terroristic threatening and her conviction was affirmed when she appealed to the Hopkins Circuit Court, the Kentucky Court of Appeals and the Supreme Court of Kentucky (DN 46, Exhibit 1, Macy Deposition at 32-33). She acknowledges the Supreme Court of the United States declined to hear her case (DN 46, Exhibit 1, Macy Deposition at 33).

Meanwhile, Macy pursued an administrative appeal of the decision to terminate her teaching contract (DN 46, Exhibit 1, Macy Deposition Exhibit No. 2). Following an evidentiary hearing, a three-member tribunal found Macy guilty of conduct unbecoming a teacher and imposed the punishment of termination of her teaching contract (DN 46, Exhibit 1, Macy Deposition Exhibit No. 2). In regard to the November 1, 2000 incident, the tribunal found "Macy's threats to kill students, her inappropriate statements about the marital status of children's families, and her inappropriate remarks regarding the students' sexual activity constituted conduct unbecoming a teacher in violation of KRS 161.790" (DN 46, Exhibit 1, Macy Deposition Exhibit No. 2 at page 5). The tribunal concluded the "seriousness of the misconduct of threatening to kill students in itself warrants termination, and the other instances of conduct unbecoming a teacher show a

pattern of misconduct and serve to reinforce that sanction"[3] (DN 46, Exhibit 1, Macy Deposition Exhibit No. 2 at page 6). The tribunal rendered its decision on January 25, 2001 (DN 46, Exhibit 1, Macy Deposition Exhibit No. 2 at page 7).

Meanwhile, the Kentucky Commission on Human Rights dismissed Macy's EEOC complaint in an order dated June 21, 2001 (DN 46, Exhibit 1, Macy Deposition Exhibit No. 5). The dismissal order indicates a finding of no probable cause to believe the Board of Education has engaged in an unlawful practice in violation of the Kentucky Civil Rights Act (DN 46, Exhibit 1, Macy Deposition Exhibit No. 5).

On August 16, 2001, the EEOC issued a document entitled "DISMISSAL AND NOTICE OF RIGHTS" (DN 46, Exhibit 1, Macy Deposition Exhibit No. 6). In this document the EEOC notified Macy that it had adopted the findings of the Kentucky Commission on Human Rights that investigated her complaint regarding the Board of Education (DN 46, Exhibit 1, Macy Deposition Exhibit No. 6). The document also provided Macy with notice of her suit rights (DN 46, Exhibit 1, Macy Deposition Exhibit No. 6)

Meanwhile, Macy timely appealed to the Hopkins Circuit Court the administrative decision terminating her teaching

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[3] The tribunal found the other instances of conduct unbecoming a teacher, in violation of KRS 161.790, are (1) making derogatory comments about a parent, site base council member and a faculty member in front of a classroom of students; (2) sending a fake detention slip to the assistant principal; and (3) improperly disciplining students and transferring them out of her class to other teachers during class time on September 28, 2000 (DN 46, Exhibit 1, Macy Deposition Exhibit No. 2 at pages 4-5).

contract with the Board of Education (DN 46, Exhibit 1, Macy Deposition Exhibit No. 7). In an order entered December 7, 2001, the Hopkins Circuit Court affirmed the administrative decision terminating Macy's teaching contract (DN 46, Exhibit 1, Macy Deposition Exhibit No. 7). Notably, one of the issues addressed by the Hopkins Circuit Court is whether the tribunal committed reversible error by not allowing specific instructions related to the ADA (DN 46, Exhibit 1, Macy Deposition Exhibit No. 7 at page 4). The Circuit Court commented as follows:

> "As stated above, the only reason for termination as provided in Petitioner's termination letter was that she engaged in conduct which is unbecoming a teacher. While the court acknowledges that special steps need to be taken in order to assure that those persons with disabilities are not discriminated against, said persons still are required to be able to adequately perform the job in which they are hired to do.
>
> In this case, where Petitioner was hired to be a teacher and role model for her students, she was required to be capable of conducting herself in a manner which is becoming of a teacher, especially in front of or towards students. If Petitioner is incapable of conducting herself in such manner due to her disability, despite reasonable accommodations under her 504 Plan, as shown by her pattern of behavior, then Respondent is permitted to terminate her contract on said grounds. There is no case law or other authority which allows Petitioner to use her disability as an excuse to allow behavior that would not be tolerated if done by other 'non-disabled' teachers. Thus, this court finds that the tribunal committed no

> reversible error in refusing to allow instructions based upon her disability under the ADA."

(DN 46, Exhibit 1, Macy Deposition Exhibit No. 7 at pages 4-5). Macy timely appealed the Hopkins Circuit Court order.

On December 13, 2002, the Kentucky Court of Appeals rendered an opinion affirming that order (DN 46, Exhibit 1, Macy Deposition Exhibit No. 8). One of the issues addressed by the Kentucky Court of Appeals is whether the Hopkins Circuit Court erred in finding the tribunal properly refused to allow specific instructions related to the ADA (DN 46, Exhibit 1, Macy Deposition Exhibit No. 8 at page 5-6). It concluded since Macy asked the tribunal to find her conduct did not rise to the level of conduct unbecoming a teacher because of her disability, the only applicable law was KRS 161.790, and as such there was no error (DN 46, Exhibit 1, Macy Deposition Exhibit No. 8 at page 6). The Kentucky Court of Appeals also noted during the administrative hearing, Macy indicated she was not asking for a determination of whether her termination was the result of discrimination under the ADA (DN 46, Exhibit 1, Macy Deposition Exhibit No. 8 at page 6). The Supreme Court of Kentucky denied her motion for discretionary review in an order entered August 17, 2005 (DN 46, Exhibit 1, Macy Deposition Exhibit No. 9).

Meanwhile, on December 14, 2004, the Kentucky Department of Education, through the Kentucky Education Professional Standards Board, revoked Macy's teaching certificate for a period often (10) years (DN 46, Exhibit 1, Macy Deposition Exhibit No. 10).

Macy's amended complaint alleges that, as a result of her 504 Plan, the Board of Education was on notice of her

disability and the difficulties it caused with maintaining concentration, anxiety, irritability, severe headaches, outbursts of anger, loud noises, memory, and depression (DN 35). The amended complaint asserts, despite the Board of Education's use of "corrective action plans" and "growth plans" to address employment related problems with other employees, it made no such effort in her case (DN 35). Macy alleges as a result of her repeated complaints about Mr. Herring not following the 504 Plan, he engaged in a course of retaliatory conduct that created a hostile work environment and included intentional discrimination against her (DN 35). The amended complaint alleges after Macy filed her EEOC complaint, Mr. Herring and the Board of Education retaliated by terminating her employment for threatening a group of students (DN 35). Macy points out the decision to terminate occurred before any judicial determination that she had threatened the students (DN 35). She alleges that her treatment was far more severe than the five-day suspension Patricia Bush, another teacher, received following a May 2003 threat to kill a student (DN 35). Macy asserts her treatment was far different from the manner in which the Board of Education treated another teacher, Rachel Reece, after being charged in Christian County with felony drug trafficking and possession charges (DN 35). Macy claims the Board of Education agreed to allow Ms. Reece to continue her employment and teaching duties after she pled guilty to misdemeanor drug and/or criminal charges (DN 35). The amended complaint alleges Macy was treated differently than similarly situated employees because of her disability, her filing the EEOC complaint, and her complaints to the Board of Education about her 504 Plan (DN 35).

The amended complaint alleges the Board of Education has violated the ADA; has retaliated against her for repeated complaints to the Board of Education about her 504 Plan; has

retaliated against her for the complaints she filed with the EEOC; has violated KRS 344.040; and has violated KRS 344.280 (DN 35). In her prayer for relief, Macy seeks compensatory damages (including lost wages); damages for emotional distress and humiliation; punitive damages; a judgment directing the Board of Education to re-employ her and establishing a 504 Plan that will accommodate her disability; attorney's fees and costs; and all other relief the Court deems appropriate (DN 35).

DISCUSSION

A

The ADA proscribes discrimination "against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C.§ 12112(a). To establish a prima facie case of discrimination under the ADA, Macy must show she is (1) a disabled person within the meaning of the Act[4], (2) who is otherwise qualified to

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[4] The Act defines a disabled person as one who (1) has a physical or mental impairment that substantially limits one or more of the major life activities of such individual, (2) has a record of such impairment, or (3) does not have an impairment, but is regarded as having one. *Sullivan v. River Valley School Dist.*, 197 F.3d 804, 810 (6th Cir. 1999) (citing 42 U.S.C. § 12102(2)). The regulations define the phrase "substantially limits" as follows:

> "(I) Unable to perform a major life activity that the average person in the general population can perform; or
> (ii) Significantly restricted as to the condition, manner or

perform the essential functions of her job with or without reasonable accommodation; and (3) that she was discharged solely by reason of her handicap. *Sullivan v. River Valley School Dist.*, 197 F.3d 804, 810 (6th Cir. 1999); *Monette v. Electronic Data Systems Corp.*, 90 F.3d 1173, 1178 (6th Cir. 1996).

The Board of Education has not asked the Court for entry of summary judgment on all three requirements in the foregoing framework (DN 46). Instead, it seeks entry of summary judgment on the limited question of whether Macy was discharged solely by reason of her disability (DN 46). Thus, the Board of Education concedes, at least for the purpose of its summary judgment motion, that Macy is a

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> duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity."

29 C.F.R. § 1630.2(j)(1) (1996). The phrase "major life activities" is defined as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i). Interpretive guidelines explain the above list "is not exhaustive" and that "other major life activities include, but are not limited to, sitting, standing, lifting, [and] reaching." 29 C.F.R. Pt. 1630 App.; *Penny v. United Parcel Serv.*, 128 F.3d 408, 414 (6th Cir. 1997). In deciding whether an individual is substantially limited in a major life activity, the Court should consider the following factors:

> (I) The nature and severity of the impairment;
>
> (ii) The duration or expected duration of the impairment; and
>
> (iii) The permanent or long term impact, or expected permanent or long term impact of or resulting from the impairment."

29 C.F.R. § 1630.2(j)(2).

disabled person within the meaning of the ADA who is otherwise qualified to perform the essential functions of her teaching job with or without reasonable accommodation.

The specific method of proof that applies under the foregoing framework will vary depending on whether Macy presents direct evidence of discrimination, or establishes a *prima facie* case which creates an inference of discrimination based on circumstantial evidence. *Monette*, 90 F.3d at 1182-1185; *Burns v. City of Columbus*, 91 F.3d 836, 841-843 (6th Cir. 1996). In direct evidence cases:

> "(1) The plaintiff bears the burden of establishing that he or she is disabled. (2) The plaintiff bears the burden of establishing that he or she is 'otherwise qualified' for the position despite his or her disability: (a) without accommodation from the employer; (b) with an alleged 'essential' job requirement eliminated; or (c) with a proposed reasonable accommodation. (3) The employer will bear the burden of proving that a challenged job criterion is essential, and therefore a business necessity, or that a proposed accommodation will impose an undue hardship upon the employer."

Hedrick v. Western Reserve Care System, 355 F.3d 444, 452 (6th Cir. 2004) (citing *Monette*, 90 F.3d at 1186.

The Sixth Circuit has indicated in an ADA case, direct evidence is evidence that demonstrates the plaintiff's disability is the ***sole reason***[5] for an adverse employment action.

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[5] Relying on the analysis in *DiCarlo v. Potter*, 358 F.3d 408, 415 (6th Cir. 2004), Macy argues direct evidence need only demonstrate that unlawful discrimination was at least a motivating factor in the

Hedrick, 355 F.3d at 455. Evidence of discrimination is not considered direct evidence unless a discriminatory motivation is explicitly expressed. For example, a facially discriminatory employment policy or a corporate decision maker's express statement of a desire to avoid hiring or firing handicapped employees is direct evidence of discriminatory intent. It can also be an oral or written comment indicating discriminatory animus by a supervisor. *Id.* at 454-455; *Ross v. Campbell Soup Co.*, 237 F.3d 701, 706-708 (6th Cir. 2001). For example, a supervisor's note that identifies the employee as a "back case" and a "problem person" as well as asks for advice on how to discharge the employee indicates discriminatory animus. *Ross*, 237 F.3d at 706-708. However, a supervisor's comment must be viewed in the entire context of the case to determine whether it is but one event in a series of comments which, when taken cumulatively, is sufficient to create a genuine issue of material fact precluding summary judgment. *Hedrick*, 355 F.3d at 454. For example, an isolated comment by a job interviewer to a treating physician that is clearly an expression of concern for the plaintiff's ability to perform a specific job's requirements, which included a fair amount of walking, is not sufficient direct evidence of discriminatory animus to survive a summary judgment

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employer's actions (DN 50 at 16). While the Sixth Circuit has applied this standard to national origin discrimination claims, *Id.*, it has expressly declined to do so as to ADA claims. *Hedrick v. Western Reserve Care System*, 355 F.3d 444, 455 (6th Cir. 2004). Further, the Sixth Circuit has declined a plaintiff's request to permit recovery under the ADA in mixed motive cases. *Hedrick*, 355 F.3d at 454 (citing *McLeod v. Parsons Corp.*, 73 Fed. Appx. 846 (6th Cir. 2003)). In sum, Macy must show that her disability was the ***sole reason*** for the Board of Education's decision to terminate her teaching contract in order to withstand a summary judgment motion. *Hedrick*, 355 F.3d at 454.

motion. *Hedrick*, 355 F.3d at 455. In sum, "direct evidence is evidence that proves the existence of a fact without requiring any inferences." *Minadeo v. ICI Paints*, 398 F.3d 751, 763 (6th Cir. 2005).

Macy argues there is direct evidence showing her disability is the reason for termination of her teaching contract (DN 50 at 16-18). Her argument is premised on the belief that the incident on November 1, 2000 is merely an outburst of anger and irritability which are symptoms of her disabling condition that the 504 Plan is intended to accommodate[6] (DN 50 at 17-18). Macy reasons since the 504 Plan is intended to accommodate such outbursts and Superintendent Stevens cited the November 1, 2000 outburst as a factor in terminating her contract, this is direct evidence of discrimination (DN 50 at 17-18). Macy argues since the 504 Plan is intended to accommodate the other behavioral problems identified by Superintendent Stevens, this is direct evidence of discrimination[7] (DN 50 at 17-18).

Clearly, the above cited evidence requires the Court to draw an inference in order to prove the existence of a fact. Thus, this is not direct evidence showing that Macy was fired because of post concussive syndrome.

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[6] In support of her position, Macy asserts Principal Herring testified he was not concerned about her "remark" and viewed it as "just Macy and the 504 Plan issues" (DN 50 at 17).

[7] In support of this argument, Macy asserts Assistant Superintendent Zellich testified that Macy was never placed on a Corrective Action Plan to address the behaviors and issues outlined in the Superintendent's termination letter because they were all being accommodated as stemming from her disability (DN 50 at 17).

The evidence, viewed in a light most favorable to Macy, demonstrates she was fired primarily because she told nine male students on the basketball team that she would "kill" them if she heard them making fun of the girls and then she repeated the threat, saying she "meant it" (DN 1, Exhibit 1, Macy Deposition Exhibit No. 8 at page 8). The cause of the threat was, we may assume, her post concussive syndrome which produces symptoms such as irritability with others and outbursts of anger (DN 50, Exhibit 1). However, if an employer fires an employee because of the employee's unacceptable behavior or misconduct, the fact that the behavior or misconduct was precipitated by a disabling condition does not present an issue under the ADA or Section 504 of the Rehabilitation Act. *See Palmer v. Circuit Court of Cook County, Ill.*, 117 F.3d 351, 352 (7th Cir. 1997), *cert. denied* 522 U.S. 1096, 118 S. Ct. 893, 139 L. Ed. 2d 879 (1998), *rehg. denied* 523 U.S. 1042, 118 S. Ct. 1344, 140 L. Ed. 2d 504 (1998) (mentally ill employee fired because she threatened to kill another employee); *Newland v. Dalton*, 81 F.3d 904, 906 (9th Cir. 1996) (alcoholic employee terminated because he attempted to fire an assault rifle inside a bar, "the kind of egregious and criminal conduct which employees are responsible for regardless of any disability"); *Little v. FBI*, 1 F.3d 255, 258-259 (4th Cir. 1993) (alcoholic fired because of alcohol related misconduct while on duty not because of alcoholism).

The ADA does not require an employer to retain a potentially violent employee. *Palmer*, 117 F.3d at 352. "Such a requirement would place the employer on a razor's edge - in jeopardy of violating the Act if it fired such an employee, yet in jeopardy of being deemed negligent if it retained him and he hurt someone." *Id*. The ADA protects only "qualified" employees, that is a teacher qualified to do the job for which she is hired; and threatening to kill students disqualifies Macy

from being a teacher. *Id.* at 352-353 (citations omitted). Furthermore, the ADA does not require the Board of Education to make accommodations for her disability when those accommodations pose a direct threat to the students at the school. 42 U.S.C. § 12113(b); 29 C.F.R. 1630.15(b)(2).

Macy's direct evidence argument is also premised on the belief that there are differences between how Superintendent Stevens dealt with her, a disabled employee who filed an EEOC Complaint, and Patricia Bush (DN 50 at 17-18). Macy characterizes Bush as a non-disabled teacher who committed the "same offense" (DN 50 at 17-18).

The Sixth Circuit has held the plaintiff must show that the "comparables" are substantially similar in all respects. *Gray v. Toshiba America Consumer Products, Inc.*, 263 F.3d 595, 599 (6th Cir. 2001). To be deemed "similarly situated," the individuals with whom the plaintiff seeks to compare her treatment must have dealt with the same supervisor, have been subject to the same standards, and engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it. *Id.* (citation omitted).

The unrebutted testimony of Superintendent Stevens shows the offenses of Bush and Macy are factually distinguishable.[8] Bush's comment was addressed to a teacher's aide and overheard by at least one student in the classroom (DN 46,

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[8] Rule 56 requires the non-moving party to present "*specific facts* showing there is a *genuine* issue for trial," by affidavit, depositions, answers to interrogatories, and/or admissions on file. Fed.R.Civ.P. 56(c) and (e) (emphasis added); *Celotex Corp v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

Exhibit 2, Stevens Deposition at 96, 168). By contrast, Macy expressed her threat directly to the nine male students. Additionally, the content differs. Bush indicated if the teacher's aide did not remove the special education student from the classroom she was going to "kill" him (DN 46, Exhibit 2, Stevens Deposition at 96, 97, 168). By contrast, Macy told the nine boys "I will kill you" if you continue to make fun of the girls and then she repeated the threat, indicating "she meant it" (DN 46, Exhibit 1, Macy Deposition Exhibit No. 8 at page 8). Finally, there is no evidence indicating Bush faced several additional charges of conduct unbecoming a teacher. By contrast, Macy faced 31 additional charges of conduct unbecoming a teacher. Clearly, this comparable is not substantially similar in respect to the charges.

Macy's direct evidence argument is also premised on the belief that there are differences between how Superintendent Stevens investigated her misconduct and Bush's misconduct (DN 50 at 17-18). Macy asserts that Superintendent Stevens requested from Principal Herring any and all information on Macy but did not make such request as to Bush (DN 50 at 17). Macy alleges her case is the only one wherein Superintendent Stevens involved the Board of Education's attorney in an investigation (DN 50 at 17). Finally, Macy asserts that attorney discussed her EEOC Complaint with Superintendent Stevens before he made the decision to terminate her contract (DN 50 at 17-18).

While there are some differences in how Superintendent Stevens investigated Macy's misconduct, in contrast to other teachers accused of misconduct, the differences are not direct evidence of discrimination. In contrast to the other investigations, Principal Herring asked Superintendent Stevens to come down to the school to deal with Macy (DN

46, Exhibit 2, Stevens Deposition at 99-100, 104-105). Further, he informed Superintendent Stevens of several additional incidents involving Macy that should have been previously reported to the central office (DN 46, Exhibit 2, Stevens Deposition at 99-100, 104-105). In fact, Superintendent Stevens was concerned about Principal Herring's failure to forward to the central office information about "several alarming incidents" involving Macy (DN 46, Exhibit 2, Stevens Deposition at 104-105). Notably, after Macy's termination, Superintendent Stevens placed Principal Herring on a Growth Plan that addressed the need for better documentation and notification to the central office (DN 46, Exhibit 2, Stevens Deposition at 105-106). In sum, Principal Herring's reporting omissions were the reason Superintendent Stevens made a request for all of the information that Principal Herring had regarding Macy.

Bush apparently taught at a different school then Macy. There is no evidence in the record indicating additional misconduct by Bush. Nor is there any evidence indicating the school's principal failed to notify the central office of prior misconduct by Bush. These differences in circumstances may explain why Superintendent Stevens did not request all information that the school principal had regarding Bush.

While Superintendent Stevens did not use the Board of Education's attorney to assist in the investigation of misconduct by other teachers, and the Board of Education's attorney did advise Superintendent Stevens of Macy's EEOC Complaint during the investigation (DN 46, Exhibit 2, Stevens Deposition at 98-99, 102, 131), this is no direct evidence showing Macy was fired because of post concussive syndrome. Again, Plaintiff's evidence does not prove the existence of a fact without requiring any inferences. Further, there are other reasonable nondiscriminatory inferences that

can also be drawn from this evidence. For example, it can be inferred that Superintendent Stevens viewed Macy's multiple incidents of misconduct as serious, and how well advised he was of Macy's circumstances before he made the decision to terminate her teaching contract.

For the reasons set forth above, the undersigned concludes that Macy has failed to tender any direct evidence that demonstrates her disability was the ***sole reason*** for the decision to terminate her teaching contract.

The undersigned will now address whether Macy has offered sufficient circumstantial proof to survive a motion for summary judgment. A three step burden-shifting analysis applies when a plaintiff offers circumstantial proof of the defendant's discriminatory intent. *Hedrick*, 355 F.3d at 453; *Sullivan*, 197 F.3d at 810. This is referred to as the *McDonnell Douglas* burden-shifting analysis. *Hedrick, 355 F.3d at 453; McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). Under the burden-shifting approach, the plaintiff establishes a *prima facie* case of discrimination by showing that (1) she is disabled; (2) otherwise qualified for the position, with or without reasonable accommodation; (3) suffered an adverse employment decision; (4) the employer knew or had reason to know of the plaintiff's disability; and (5) the position remained open while the employer sought other applicants or the disabled individual was replaced. *Hedrick*, 355 F.3d at 453.

Once a *prima facie* case is established, the burden of production shifts to the employer to offer a legitimate, nondiscriminatory reason for its action. *Id*. If the employer satisfies this burden of production, the plaintiff must then introduce evidence showing that the proffered reason is a

pretext for discrimination. *Id.*; *Walsh v. United Parcel Service*, 201 F.3d 718, 724-726 (6th Cir. 2000); *Monette*, 90 F.3d at 1186-1187 (6th Cir.1996); *McDonnell Douglas Corp.*, 411 U.S. at 802-03; *Williams v. City of London*, 252 F. Supp. 2d 388, 396 (E.D. Ky. 2003). In order for the plaintiff to prevail at the pretext stage, the plaintiff must prove that the reasons stated by the defendant for her termination (1) have no basis in fact; (2) did not actually motivate her discharge; or (3) were insufficient to motivate her discharge. *Williams*, 252 F. Supp. 2d at 396 (citations omitted). Under this scheme, although the burden of production shifts, the burden of persuasion remains at all times with the plaintiff. *Hedrick*, 355 F.3d at 453; *Monette*, 90 F.3d at 1186-1187.

Here, the Board of Education seems to concede that a *prima facie* case is established (DN 46). For the reasons set forth above, the Board has offered a legitimate, nondiscriminatory reason for terminating Macy's teaching contract. Thus, the burden shifts to Macy to introduce evidence showing the proffered reason is a pretext for discrimination. Essentially, Macy restates the direct evidence referred to above (DN 50 at 18-19). This evidence is not sufficient to demonstrate there is a genuine issue of fact for trial at the pretext stage. Stated differently, the record taken as a whole could not lead a rational trier of fact to find for Macy. In sum, the Board of Education is entitled to summary judgment in its favor on Macy's claim that it violated the ADA (DN 35 at page 9).

B

Macy's second claim in the amended complaint alleges the Board of Education retaliated against her for her complaints that the 504 Plan was not being followed by the Board and Principal Herring; that Principal Herring was intentionally

discriminating against her based on her disability; that the 504 Plan was not fulfilling the accommodations that it was intended; and that she was not being fully accommodated by the Board of Education (DN 35 at paragraphs 50-54, 88). Notably, Macy has not identified the law that she believes the Board of Education violated.

The evidence taken as a whole and viewed in a light most favorable to Macy shows the Board of Education terminated Macy's teaching contract because of her misconduct. No jury could reasonably find otherwise on this evidence. Thus, the Board of Education is entitled to summary judgment in its favor on this claim, regardless of whether Macy is alleging retaliation in violation of the ADA, or Section 504 of the Rehabilitation Act, or KRS 344.280.

C

Macy's third claim in the amended complaint alleges the Board of Education retaliated against her for her complaints filed with the EEOC (DN 35 at paragraph 90). Again, Macy has not identified the law that she believes the Board of Education violated.

The evidence taken as a whole and viewed in a light most favorable to Macy shows the Board of Education terminated Macy's teaching contract because of her misconduct. No jury could reasonably find otherwise on this evidence. Thus, the Board of Education is entitled to summary judgment in its favor on this claim, regardless of whether Macy is alleging retaliation in violation of the ADA, or Section 504 of the Rehabilitation Act, or KRS 344.280.

D

Macy's fourth claim alleges the Board of Education has violated KRS 344.040 (DN 35 at paragraph 92). The relevant part of the statute reads as follows:

> "It is an unlawful practice for an employer:
> (1) To fail or refuse to hire, or **to discharge any individual**, or otherwise to discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment, because of the individual's race, color, religion, national origin, sex, age forty (40) and over, **because the person is a qualified individual with a disability,** or because the individual is a smoker or nonsmoker, as long as the person complies with any workplace policy concerning smoking;"

KRS 344.040(1) (emphasis added). Since the language in the disability discrimination provisions of the Kentucky Civil Rights Act ("KCRA") tracks the ADA, it should be interpreted consonant with that Act. *Henderson v. Ardco*, Inc., 247 F.3d 645, 649 (6th Cir. 2001); *Summers v. Middleton & Reutlinger P.S.C.*, 214 F. Supp. 2d 751, 755-756 (W.D. Ky. 2002). The evidence taken as a whole and viewed in a light most favorable to Macy shows the Board of Education did not terminate Macy's teaching contract because she is a qualified individual with a disability. Rather, it terminated her teaching contract because of her misconduct. No jury could reasonably find otherwise on this evidence.

E

Macy's fifth and final claim in the amended complaint alleges the Board of Education has violated KRS 344.280

(DN 35 at paragraph 94). The relevant part of the statute reads as follows:

> "It shall be an unlawful practice for a person, or for two (2) or more persons to conspire:
> (1) To retaliate or discriminate in any manner against a person because he has opposed a practice declared unlawful by this chapter, or because he has made a charge, filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under this chapter;"

KRS 344.280(1). To prevail on her retaliation claim, Macy must show that (1) she engaged in a protected activity; (2) the Board of Education knew about the protected activity; (3) the Board of Education took employment action adverse to Macy; and (4) there was a causal connection between the activity engaged in and the adverse treatment. *Underhill v. Caudill*, 186 F. Supp. 2d 736, 741 (W.D. Ky. 2001) (citing *Fenton v. HiSAN, Inc.*, 174 F.3d 827, 831 (6th Cir.1999)).

Macy has met the first three prongs: she filed the EEOC complaint; the Board of Education knew of the complaint; and the Board of Education subsequently terminated her teaching contract. However, Macy cannot establish the fourth prong. The evidence taken as a whole and viewed in a light most favorable to Macy shows the Board of Education terminated Macy's teaching contract because of her misconduct, not because of she filed an EEOC Complaint. No jury could reasonably find otherwise on this evidence.

F

The Board of Education argues the doctrine of election of remedies as well as the doctrines of res judicata and collateral

estoppel bar the issues raised by Macy in this civil action (DN 46 at 9-15). In light of the above determinations on the merits, the Court need not address these arguments.

CONCLUSION

For the foregoing reasons, the Court concludes that Defendant's motion for summary judgment should be GRANTED. The Court will issue a separate order granting Defendant's motion for summary judgment.

May 1, 2006

E. Robert Goebel
United States Magistrate Judge

ORDER

Before the Court is Defendant's motion for summary judgment (DN 46). Plaintiff has filed a response in opposition to the motion (DN 50) and Defendant has filed a reply memorandum (DN 51). For the reasons set forth in the Court's Memorandum Opinion,

IT IS HEREBY ORDERED that Defendant's motion for summary judgment is GRANTED in favor of Defendant and against Plaintiff as to all claims set forth in Plaintiff's amended complaint (DN 35).

This is a final and appealable order and there is no just cause for delay.

May 1, 2006

E. Robert Goebel
United States Magistrate Judge

JUDGMENT

This matter came before the Court on Defendant's motion for summary judgment (DN 46). The Court has granted summary judgment in favor of Defendant and against Plaintiff as to all claims set forth in Plaintiff's amended complaint (DN 35).

IT IS HEREBY ORDERED AND ADJUDGED that this action be and the same is hereby **DISMISSED with prejudice**.

This is a final and appealable judgment and there is no just cause for delay.

May 1, 2006

E. Robert Goebel
United States Magistrate Judge

APPENDIX C

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 126. EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES EMPLOYMENT

42 U.S.C. § 12112

§ 12112 Discrimination

(a) General rule. No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

* * * * *

TITLE 29. LABOR
CHAPTER 16. VOCATIONAL REHABILITATION AND OTHER REHABILITATION SERVICES RIGHTS AND ADVOCACY

29 U.S.C. § 794

§ 794. Nondiscrimination under Federal grants and programs

(a) Promulgation of rules and regulations. No otherwise qualified individual with a disability in the United States, as

defined in section 7(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

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